SUPREME COURT OF THE UNITED STATES.

No. 39.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOHN FITZGERALD AND WIFE.

IN ERROR TO THE CIRCUIT COURT U. S. FOR EAST LOUISIANA.

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Langtree & O'Sullivan, Print.

No. 4.

CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT AND EASTERN DISTRICT OF LOUISIANA.

THE UNITED STATES *vs.* JOHN FITZGERALD et. uxor. } No. 3862. Dist. Court & 103 C. Court.

Be it remembered that on the fifth day of January, in the year of our Lord one thousand eight hundred and thirty-seven, the United States came into court by P. K. Lawrence, esqr. their attorney, and filed the following petition, to wit:

To the honorable the district court of the United States of America, in and for the eastern district of Louisiana.

The petition of the United States of America by P. K. Lawrence their attorney for the district aforesaid, respectfully shews: That on the eighteenth day of June, one thousand eight hundred and thirty-six, these petitioners were the true and lawful owners of a certain tract of land situated in the parish of Plaquemines, within the aforesaid district, containing one hundred and sixty acres, and known and lying in township No. 24 of range No. 30 east, designated as and being section No. 8, and containing the aforesaid number of acres, according to an authentic plan, to be exhibited on the trial. And these petitioners further shew, that on the said eighteenth day of June in the year aforesaid, one John Fitzgerald, and one Hipolite Fitzgerald, his wife, both of the district aforesaid, did enter with the register of land office at New Orleans, in the district aforesaid, the said tract of land, under the pretence of being entitled to the same by virtue of the right of pre-emption. Now these petitioners aver, that said John Fitzgerald, and Hypolite Fitzgerald, his wife, have acquired no right nor title to said land, nor has either of them, but that said lands are, and continue to be, public lands, and that the title thereto remains in these petitioners, for this, to wit:

That on or about the sixth day of May, eighteen hundred and thirty-three, said John having been appointed an officer of the customs for the port of New Orleans, was despatched by the collector of said port to the south-west pass of the Mississippi river, (so called) in order to discharge the duties of his said office, that he was stationed at a proper point or place on said river, to be used by him as a residence during his continuance in office as aforesaid, the said point or place being within the limits of the above mentioned tract; but these petitioners expressly deny that he took possession of said land as a settler, or that he occupied the same in any other manner or for any other purpose than is

before stated, or in any other capacity than an official agent, as is also above stated.

And these petitioners further represent, that the entry of said tract of land was made in error and wrongfully, and that no right or title passed to said John and Hipolite his wife, because these petitioners aver, and so the truth is, that said land had, many years preceding said entry, been appropriated for public purposes, to wit: for the convenience and accomodation of the officers of the government, attached to the custom house at New Orleans aforesaid, and other public purposes; all which was well known to them the said John and Hipolite his wife, and to each of them.

And these petioners further shew that they have amicably demanded from said John and Hipolite, to remove from and vacate said lands and to abandon their title to the same, and that they have tendered to them the amount by them paid into the land office aforesaid on making said entry, to wit: the sum of two hundred dollars, and that they are still ready to return the same, but they have refused, and still do refuse so to do, to the damage of these petitioners three thousand dollars.

Wherefore these petitioners pray that said John Fitzgerald, and Hipolite Fitzgerald, his wife, be cited to appear before this honorable court, in due course of law, and that they be adjudged to deliver the possession of said tract of land to these petitioners, and condemned and decreed to pay them the said sum of three thousand dollars, damages as aforesaid, that these petitioners be declared to be the legal owners of said land, that they recover their costs and receive general relief.

(Signed) P. K. LAWRENCE,
U. S. Atty. East. Dist. Louisiana.

And afterwards, on the 6th day of January, 1837, the following citation issued from the clerk's office, to wit:

The President of the United States of America, to the Marshal of the eastern district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded, to cite John Fitzgerald, so that he be and appear at the district court of the United States, for the eastern district of Louisiana, to be holden in the city of New Orleans, on the third Monday of February, 1837, to answer to the complaint of the United States, and that he do file his defence or answer with the clerk of said court, on or before the same, or judgment will be given against him by default, and have you then and there this writ.

Witness the honorable Samuel H. Harper, judge of the said court, at the city of New Orleans, this 6th day of [L. s.] January, 1837, and 61st year of the Independence of the United States.

(Signed) T. W. COLLENS, *Dy. Clerk.*

Marshal's Return.

Served copy of plaintiff petition and copy of citation on the within named defendant, John Fitzgerald, January 27th, 1837, in person, at the south-west pass, parish of Plaquemines, one hundred miles from New Orleans.

(Signed) J. H. HOLLAND, *Marshal.*

And on same day the following citation issued from the clerk's office, to wit:

The President of the United States of America, to the Marshal of the eastern district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded to cite Hipolite Fitzgerald, wife of John Fitzgerald, so that she be and appear at the district court of the United States, for the eastern district of Louisiana, to be holden in the city of New Orleans, on the third Monday of February, 1837, to answer to the complaint of the United States, and that she do file her defence or answer, with the clerk of said court, on or before the same, or judgment will be given against her, by default, and have you then and there this writ.

Witness the honorable Samuel H. Harper, judge of the [L. s.] said court, at the city of New Orleans, this 6th day of January, 1837, and 61st year of the Independance of the United States.

(Signed) T. W. COLLENS, *Dy. Clerk.*

Le Président des Etats Unis d'Amérique, au maréchal du district oriental de la Louisiane, ou à son député dûment autorisé, salut: Vous êtes commandé de citer Hipolite Fitzgerald épouse de John Fitzgerald, pour qu'elle ait à comparaitre à la cour de district des Etats Unis, pour le district oriental de la Louisiane, qui siégera dans la ville de la Nouvelle Orléans, le troisième lundi de Fevrier 1837, à l'effet de répondre à la plainte des Etats Unis d'Amérique, et d'y remettre réponse ou defense au Greffier de la dile cour, avant ou le même jour: fauté de quoi, jugement par défaut sera rendu coutre elle; et vous ferez votre rapport de cet ordre.

Témoin l' honorable Samuel H. Harper, judge de la dite cour, à la ville de la Nouvelle Orleans, ce 6eme Jour de Janvier 1837 et l'aunée de l' indépendance des Etats Unis la 61eme.

(Signed) T. W. COLLENS, *Dy. Greffier.*

Marshal's Return.

Served copy of plaintiff's petition and copy of citation on the within named defendant, Hypolite Fitzgerald, wife of John Fitz-

gerald, January 27th, 1837, in person, at the south-west pass, parish of Plaquemine, one hundred miles from New Orleans.

(Signed) J. H. HOLLAND, *Marshal.*

And afterwards, on the 20th day of February, 1837, the defendants came into court by T. M. Wadsworth, esqr., their attorney, and filed the following answer, to wit:

To the hon. the district court of the United States of America, in and for the eastern district of Louisiana. The answer of John Fitzgerald, and Hipolite Fitzgerald, of the parish of Plaquemines, in this State, to the petition of the United States of America, by P. K. Lawrence their attorney for the district aforesaid, claiming of the respondents a certain tract of land, described in said petition, respectfully sheweth,

That these respondents deny generally all the allegations contained in said petition except those hereinafter expressly admitted.

That the said John Fitzgerald was, as stated in said petition, appointed an officer of the customs, and discharged the duties as boarding officer at the south-west pass, where your respondents repaired; they there found no accomodations or dwelling afforded them by the United States, but were under the necessity of procuring the same upon their own responsibility, in effecting which they expended their own money and means.

That the respondents having complied with all the requisitions of the law of the United States, granting pre-emption rights, entered the said tract of land, and are by the laws of the United States entitled to the same.

Wherefore the respondents pray that this suit may be dismissed with damages and costs, and for all other relief that the nature of the case may require. And as in duty bound, &c.

(Signed) T. M. WADSWORTH,
Atty. for Petitioners.

And afterwards, to wit: on the 31st day of May, 1839, the following entry was made of record to wit:

THE UNITED STATES
vs. } No. 103.
JOHN FITZGERALD & wife.

On motion of the district attorney, this cause was continued, defendants counsel being absent.

And afterwards, on the twentieth day of December, 1839, the following entry was made of record, to wit:

THE UNITED STATES
vs.
JOHN FITZGERALD et. als. } No. 103.

This cause which had been filed for trial for this day, was, on motion of Thomas Slidell, esqr., United States district attorney, continued until Thursday next at 10 o'clock, A. M.

And afterwards, on the 26th day of December, 1839, the following entry was made of record, to wit:

THE UNITED STATES
vs.
FITZGERALD et. als. } No. 103.

On motion of the district attorney this cause was continued until to-morrow.

And afterwards, on the 27th day of December, 1839, the four following documents were filed in court, to wit:

Reserve of land for Custom House.

General Land Office, 3d *November*, 1836.

Sir,

In the statement of persons claiming lands by right of pre-emption, under the act of 19th June, 1834, and in virtue of the circular letter of instructions, from this office, of the 7th May last, forwarded with your letter of the 22d August last, I observe that John Walker has applied to enter section 8 township 24 range 30 E. The Secretary of the Treasury has directed this tract of land to be reserved from sale, as it is important for the use of the custom house at New Orleans; consequently you will be pleased to notify Mr. Walker, and Messrs. John and Hipolite Fitzgerald, (under whom it is presumed Mr. Walker claims) of this order, and that no entry whatever can be permitted of this land. Be pleased to note on your plats, that the above mentioned tract is a reservation for the use of the custom house.

I am, very respectfully, your obt. servt.

(Signed) JNO. M. MOORE,
Acting Commissioner.

Regd. at New Orleans, Louisiana.

Testimony of Martin Gordon, senr.

UNITED STATES
vs.
FITZGERALD.
} U. S. Circuit Court.

Testimony of Martin Gordon, sr., a witness on behalf of the plaintiffs.

This testimony to be used on trial of this cause, subject to all legal exceptions on part of defts.

In 1833 deponent was collector of the customs at N. Orleans. As such collector, I nominated, and by the Secretary of Treasury, Fitzgerald was appointed Inspector of customs for the district of Mississippi; and deponent then named defendant as boarding officer at the S. west pass; the station or place Fitzgerald occupied, had been previously occupied by his predecessor for the same purpose. To enable a boarding officer to perform his duties as boarding officer, it was, and is necessary he should have a station ashore. Has seen the house Fitzgerald occupied, has been there. It is the same ground as deponent believes now in controversy—does not believe defendant occupied any other place down there than the *locus in quo*. Deponent stayed some nights down there at that period; to deponent's knowledge, this is the best and only site in that region for a boarding officer's station; this particular site, was, to his personal knowledge, the station of boarding officers as far back as 1830, and according to repute it was so, long previous to that time. Fitzgerald was there in 1833, as boarding officer, how much after that year deponent knows not or does not recollect.

Cross Examination.

Witness had no special authority to appropriate the land in question, from the President of the United States, or any other of the heads of the Department; but witness found the land used by the boarding officer sent to the S. W. pass, and continued the boarding officer there without special instruction to that effect. Witness never wrote to the Secretary of the Treasury at Washington, or to any other officer of the General Government, requesting that the land should be reserved from sale, on the ground that it was occupied for public purposes. That from report witness believes that Mr. Fitzgerald had a wife and family when he was sent to the S. West pass. That the government never erected any buildings on the land, or made any other expenditure for the accommodation of the boarding officer residing there; at least so far as deponent's present recollection extends. That the boarding officer was not obligated to remain on the property in question, it was in his discretion to remain ashore there,

or at any point of the pass where he might see fit to reside in order to enable him to discharge his duties. The place of residence of the boarding officer was entirely within the discretion of the officer—that no house had been prepared by the government at any point in the pass for the use of the boarding officer—that the pay of a boarding officer is three dollars per day.

(Signed) MARTIN GORDON, SENR.,
Affidavit waived. (Signed) T. S. *U. S. D. A.*

Application, &c.

Application to the register and receiver of the land office for the south eastern district of Louisiana at New Orleans.

Gentleman:

In virtue of an act of Congress, approved on the 19th June, 1834, entitled "an act to revive the act entitled 'an act to grant pre-emption rights to settlers on the public lands, approved on the 29th May, 1830,'" we apply to become the purchaser of a certain tract of land, situated and lying in township No. 24 of range No. 30 east, designated as, and being section No. 8, containing 160 acres, agreeably to the township plat on file in the register's office. We cultivated the said tract of land (designated as above,) in the year 1833, by raising corn &c, thereon, and continuing on the same, was in actual possession and peaceable occupancy thereof, at the date of the passage of the above mentioned act; we therefore pray that we may be permitted to enter the said tract according to law.

(Signed) JNO. FITZGERALD,
" HIPOLITE FITZGERALD.

Affidavit of Applicant.

Personally appeared before me, John Fitzgerald, and Hipolite Fitzgerald, who being duly sworn, deposeth and says that the facts contained and set forth in their foregoing applications, are true, and that every matter and thing therein stated, is strictly correct; so help us God.

(Signed) JNO. FITZGERALD.
" HIPOLITE FITZGERALD.

Sworn to, and subscribed at Plaquemines, this 2d day of June, 1836, before me. (Signed.) WM. B. G. TAYLOR,
Justice of the Peace.

Corrobarative Testimony.

Also, personally appeared John Leach and C. Lawrendy, of said parish of Plaquemine, who being duly sworn, declared (in

answer to interrogatories to them propounded by me,) that they are well acquainted with the said applicants, that their within application has been fully read and explained to these deponents, and that all the facts therein contained, in relation to the cultivation and possession by the said applicants of the land described in the said application, are, to these deponents knowledge, true.

And these deponents further declare, that they are in no manner interested or concerned with the said applicant in the said tract of land.

(Signed) JNO. LEACH,
" C. LAWRENDY.

Sworn to and subscribed at Plaquemine, this 3d day of June, 1836, before me. (Signed) WM. B. G. TAYLOR,
Justice of the Peace.

Agreeably to the provisions of the 9th section of an act of Congress, approved the 19th June, 1834, Jno. Fitzgerald and Hipolite Fitzgerald were permitted to enter land elsewhere to make up the quantity the law allowed each, they in consequence entered section No. 42 in township No. 1 of range No. 7 east, containing 167, 55-100th acres, the entry not interfering with other settlers entitled to preference, as it has been satisfactorily proved to the register and receiver by the following testimony, viz:

Personally appeared before me Charles Bishop, who being duly sworn, declared that the land applied for above, is vacant, from personal knowledge.

(Signed.) CHAS. BISHOP.

Sworn and subscribed, at New Orleans, this 18th day of June, 1836, before me. (Signed.) EDW. RAWLE,
Judge of the City Court.

T. 24. R. 30. Section No. 8.	-	-	160
T. 1. R. 7. Sect. " 42.	-	-	167 55
		Acres	327 55

Cert. No. 1360.

I, B. Z. Canonge, Register of the land office, at New Orleans, do hereby certify the foregoing described lots, contain three hundred and twenty seven 55-100 acres, as stated in the foregoing application, according to the returns of the Surveyor General, and that the price agreed upon is, one dollar and twenty-five cents per acre.

New Orleans, June 18th, 1836.

(Signed.) B. Z. CANONGE,
Register.

$409 44

I certify the foregoing to be a true and correct copy of the original application deposited in this office.

Witness my hand, this 3d day of January, 1836, at city of New Orleans.

(Signed.) B. Z. CANONGE,
Register.

The above sketch is made from the returns of surveys in the office of the Surveyor General of Louisiana, at Donaldsonville, and is given, to enable the actual settlers to establish their claims, each lot containing, by estimation, 160 acres.

June 19th, 1836.

(Signed.) H. T. WILLIAMS,
Surveyor General.

I do hereby certify the above plat to be a true and correct copy of the original deposited in this office.

Witness my hand, this 3d January, 1836, at the city of New Orleans.

(Signed.) B. Z. CANONGE,
Register.

And on same day the following entry was made of record, to wit:

UNITED STATES
vs.
FITZGERALD & wife. } No. 103.

This cause came on this day before the presiding judge, the district judge declining to sit therein, having been attorney for the plaintiffs on the institution of this suit, Thomas Slidell, esqr., district attorney of the United appearing for plaintiffs, and R. M. Carter, and Balie Peyton, esqrs., for defendants, when, after hearing the evidence and arguments of counsel, the court took time to consider.

And afterwards, on the twenty-eighth day of December, 1839, the following judgment was entered of record, to wit:

UNITED STATES
vs.
FITZGERALD & wife. } No. 103.

In this case the court having maturely considered its opinion, now order, adjudge and decree, that the defendants be quieted in their possession of the premises in dispute, and that the plaintiffs take nothing by their petition.

Judgment engrossed on the back of the Petition.

UNITED STATES
vs.
FITZGERALD & wife. } No. 103.

In this case the court having maturely considered its opinion, now order, adjudge and decree that the defendants be quieted in their possession of the premises in dispute, and that the plaintiffs take nothing by their petition.

Judgment entered, December 28th, 1839.
Judgment signed, January, 10th, 1840.

(Signed.) J. McKINLEY,
Presiding Judge.

And afterwards, on the twenty-first day of April, 1840, the plaintiffs came into court by Thomas Slidell, esqr., United States district attorney, and filed the following petition for writ of error to wit:

THE UNITED STATES OF AMERICA *vs.* JOHN FITZGERALD & wife HIPOLITE FITZGERALD.	To the judges of the United States circuit court, for the ninth judicial circuit, and eastern district of Louisiana.

The petition of the United States of America, plaintiffs in said case, respectfully shews, that there is error to their prejudice in the final judgment rendered against them, and in favor of the defendants in this cause, entered on the 28th December, 1839, and signed January 10th, 1840; wherefore they pray a writ of error.

(Signed.) THOMAS SLIDELL,
United States Attorney for the Eastern District of Louisiana.

Order.

Let a writ of error issue in the above case.
April 21st, 1840.
(Signed.) J. McKINLEY,
Presiding Judge.

CLERK'S OFFICE, U. S. CIRCUIT COURT,
9th Circuit, Eastern District of Louisiana.

I, Duncan N. Hennen, clerk of the said court, do hereby certify the foregoing twelve and a half pages of writing, to contain a true and correct transcript of all the proceedings, process, pleadings, documents, and other matters, on file and of record in this office, in a case wherein the United States of America are plaintiffs, and John Fitzgerald, and Hypolite Fitzgerald, his wife, are defendants. No. 103 of the docket of said court.

Witness my hand, and the seal of said court, at New
[L. S.] Orleans, this 30th of May, 1840.
DUNCAN N. HENNEN, *Clerk.*

I, P. K. Lawrence, one of the judges of the circuit court of the United States, 9th circuit, and eastern district of Louisiana, do hereby certify, that Duncan N. Hennen, who subscribed the above certificate, is now, and was, at the time of so doing, the clerk of the said court, and that due faith and credit are, and ought to be given to his attestations as such, and that the above is in due form of law.

Given under my hand and seal, this 30th May, A. D. 1840.
[L. S.] P. K. LAWRENCE,
U. S. Judge.

UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the honorable the judges of the circuit court of the United States, for the ninth circuit and eastern district of Louisiana, greeting: Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, before you, or some of you, between the United States, plaintiffs, and John Fitzgerald, and Hipolite Fitzgerald, his wife, defendants, a manifest error hath happened, to the great damage of the said United States, as by their complaint appears; we being willing, that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, than then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States ought to be done.

Witness the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this
[L. S.] second Monday of January, in the year of our Lord one thousand eight hundred and forty, and of the Independence of the United States the sixty fourth.

DUNCAN N. HENNEN, *Clerk.*

CLERK'S OFFICE, U. S. CIRCUIT COURT,
9th Circuit, Eastern District of Louisiana.

I do hereby certify that a copy of the foregoing writ of error was lodged in the clerk's office aforesaid, on the day of 1840.

CLERK'S OFFICE, UNITED STATES CIRCUIT COURT,
Ninth Circuit and Eastern District of Louisiana.

I do hereby certify that a copy of the foregoing writ of error was lodged in the clerk's office aforesaid, on the 21st day of April, 1840.

Witness my hand, and the seal of said court, at New
[L. S.] Orleans, this 13th day of July, 1840.

FRANCIS A. FOYGNET, *Depy. Clerk of*
DUNCAN N. HENNEN, *Clerk of said Court.*

The United States of America, to John Fitzgerald, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of January next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the ninth judicial circuit and eastern district of Louisiana, wherein the United States are plaintiffs in error, and yourself and Hypolite Fitzgerald, your wife, are defendants in error, to shew cause if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this second
[L. S.] Monday of January, in the year of our Lord one thousand eight hundred and forty.

P. K. LAWRENCE,
U. S. Judge.

Served on the 27th of same month, a copy of the within citation, on John Fitzgerald, in person, at New Orleans. Returned in court, May 29th, 1840.

M. MARIGNY, *U. S. Marshal,*
by D. O. NADAUD, *Dy. U. S. Marshal.*

THE UNITED STATES *vs.* JOHN FITZGERALD. } Circuit court of the United States of America, for the 9th judicial circuit, eastern district of Louisiana.

D. O. Nadaud, being duly sworn, deposeth and saith, that he is, and on the 27th of May, 1840, was, a deputy marshall of the United States, in and for the eastern district of Louisiana, duly qualified, and that the facts set forth in the foregoing return, dated May 29, 1840, signed by him are true.

D. O. NADAUD.

Sworn to before me this June, 1840.

P. K. LAWRENCE,
U. S. Judge.

The United States of America, to Hipolite Fitzgerald, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of January next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the ninth judicial circuit and eastern district of Louis-